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OFFICE OF PETITIONS

In re Application of  
Brown, et al.  
Application No. 10/727,998  
Filed: June 3, 2005  
Attorney Docket No. D9359B

ON PETITION

This is a decision on the papers filed July 20, 2005, which have been treated as a request for reconsideration of a petition requesting that the above-identified application be accorded a filing date of December 3, 2003, including the specification.

The application was submitted on December 3, 2003. However, on May 12, 2005, the Office of Initial Patent Examination (OIPE) mailed a "Notice of Incomplete Nonprovisional Application," (Notice) that stated the application had not been accorded a filing date, and that, among other items, the specification appears to have been omitted.

In response, on June 3, 2005, a copy of the specification and the original petition were submitted.

Petitioner stated in the original petition, "Attached as Exhibit C, is a copy of Applicant's Transmittal Form for the captioned U.S. Patent Application at issue. At page 2 of this transmittal form, Applicant checked box 5, to incorporate by reference, the entire specifications, drawings, claims, and oath of the prior co-pending patent applications listed at page 1 of the transmittal form."

... Petitioner appears to request the use of the incorporation by reference statement in Box 5 of the Utility Patent Application Transmittal to incorporate-by-reference the specifications of prior application nos. 09/692,273 and 09/295,438, in order to accord the above-identified application a filing date of December 3, 2003. However, please note MPEP 201.06(c):

**"A. Application NOT Entitled to a Filing Date**

Material needed to accord an application a filing date may not be incorporated by reference. Therefore, if a continuation or divisional application as originally filed incorporates by reference material omitted from the application papers, which is needed to accord the application a filing date, the application will not be entitled to a filing date. A petition under 37 CFR 1.182 and the required petition fee, including an amendment

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submitting the necessary omitted material, requesting that the necessary omitted material contained in the prior application and submitted in the amendment, be included in the continuation or divisional application based upon the incorporation by reference statement, is required in order to accord the application a filing date as of the date of deposit of the continuation or divisional application. An amendment submitting the omitted material and relying upon the incorporation by reference will not be entered in the continuation or divisional application unless a decision granting the petition states that the application is accorded a filing date and that the amendment will be entered." (Emphasis added).

It is noted that the required amendment that specifically requests that the necessary omitted material contained in the prior application and submitted in the amendment, be included in the continuation or divisional application based upon the incorporation by reference statement still has not been submitted. As such, at the present time, the petition must be dismissed. However, this decision is made without prejudice to reconsideration.

Any request for reconsideration should be filed within **TWO MONTHS** of the date of this decision in order to be considered timely. This time period may not be extended pursuant to 37 CFR 1.136.

Further correspondence with respect to this matter should be addressed as follows:

By mail:                    Mail Stop Petition  
                              Commissioner for Patents  
                              Box 1450  
                              Alexandria, VA 22313

By FAX:                    (703) 872-9306  
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                              Alexandria, VA 22314

The application shall retain the ~~June 3, 2005 filing date, the date of submission of the~~ specification.

Telephone inquiries should be directed to the undersigned at (571) 272-3228.



Edward J. Tannouse  
Petitions Attorney  
Office of Petitions  
Office of the Deputy Commissioner  
for Patent Examination Policy